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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-930

SHERMAN EDWARD JACKSON,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Oregon Court of Appeals affirming petitioner's conviction of being an ex-convict in possession of a concealable firearm (Petition, at A-6 through A-13) is reported at 33 Or. App. 139, 575 P.2d 1001 (1978). The Oregon Supreme Court's denial of his petition for discretionary review of the court of appeals' decision (Petition, at A-14) is officially reported at 283 Or. 99 (1978). It is not reported unofficially in the National Reporter System.

JURISDICTION

The Oregon Court of Appeals affirmed petitioner's conviction on March 13, 1978. The Oregon Supreme

Court denied a timely petition for discretionary review on July 25, 1978.[1] No application was made to this Court for enlargement of the 90-day period prescribed by Rule 22(1) for the filing of petitions for certiorari in state-court criminal cases. The petition for certiorari herein was filed on November 8, 1978, 106 days after the Oregon Supreme Court's denial of review. This Court's jurisdiction was invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Petitioner's statement is accepted.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's statement is accepted.

STATMENT OF THE CASE

Petitioner's statement of the facts of this case is generally accurate, but incomplete and argumentative. By way of correction thereof, we add the following.

(1) The remark of the prosecutor on which petitioner largely bases his claim of misconduct in the first trial of this case (Petition, at 4-5, 11, 14) was made in the course of the *second* trial, during a discussion concerning the admissibility of a kind of evidence (petitioner's association with known criminals) different from that which had been ruled inadmissible in the first trial (petitioner's struggle with

[1]Petitioner incorrectly gives this date as July 26, at page 1 of his petition. But see Petition, at A-14, where the correct date is clearly shown.

the police and arrest on other charges at the time the prohibited weapon was found in his automobile) (See Petition, at 4-5).

(2) At the beginning of the first trial herein, the trial court gave the prosecutor an opportunity to explain to her witnesses that the court had ruled inadmissible any evidence of petitioner's struggle with the police and arrest on other charges at the time the weapon was found (I Tr. 111-112). In the course of responding to petitioner's first motion for mistrial, the prosecutor represented that she had done so, and that the testimony on which the motion was based had been unintentionally elicited (I Tr. 118; *cf.* Petition, at 7-8). The court promptly struck the testimony in question and instructed the jury to disregard it (I Tr. 121).

(3) As the trial court pointed out when it granted petitioner's second motion for mistrial, the police officer's testimony on which the motion was based (the fact that the prohibited weapon had been stolen) was not within the scope of the court's prior ruling excluding evidence of petitioner's struggle with the police and arrest (I Tr. 92, 108-109, 126-127; *cf.* Petition, at 8-9).

REASONS FOR DENYING THE WRIT

A. The petition is untimely filed.

If we correctly understand the rules of this Court and their application to Oregon criminal cases, the

90-day period prescribed by Rule 22(1) for petitioning for certiorari in this case should be based on July 25, 1978, the date the Oregon Supreme Court denied a petition for discretionary review herein, and not, as counsel for petitioner seems to think,[2] on August 12, 1978, the date of the trial-court order subsequently entering the mandate of the Oregon Court of Appeals. See Stern & Gressman, Supreme Court Practice § 6.2 (5th ed. 1978). Hence, as we understand it, the 90th day for filing a petition for certiorari in this case was October 23, 1978. Counsel for the petitioner herein, apparently relying on his own interpretation of Rule 22(1), made no application to this Court for an enlargement of the time allowed under the rule, but nevertheless filed the petition herein on November 8, 1978, 106 days after the Oregon Supreme Court decided not to hear this case. We submit that the petition is therefore untimely filed.[3]

We recognize that, even if our understanding of the Court's rules is correct, the mere fact that the petition herein is untimely filed does not deprive the Court of jurisdiction to consider it. See *Schacht v. United States,* 398 U.S. 58, 63-65 (1970) (construing Rule

[2]See Petition, at 1, 2.

[3]We note in passing that counsel for petitioner attempted, unsuccessfully, to stay the issuance of the court of appeals' mandate to the trial court (Petition, at A-15). Under the circumstances, we cannot help wondering whether, under petitioner's interpretation of Rule 22(1), an indefinite stay of the mandate would have extended indefinitely the time in which to petition for certiorari.

22(2) in a federal criminal case). We submit, however, that the petition herein does not demonstrate any compelling reason for belatedly waiving the Court's rules with respect to timeliness of filing, and that the untimeliness of the petition is therefore a valid reason for denying certiorari in this case.

B. The decision below correctly holds, on the facts of this case, that the Constitutional question urged by petitioner herein is not properly presented.

As his principal argument for the grant of certiorari in this case, after discussing the scope of the holding in *United States v. Dinitz,* 424 U.S. 600 (1976), petitioner suggests that

> This Court should accept review in this case to decide whether prosecutorial "overreaching" [so egregious as, not only to require a mistrial, but also to bar retrial on Double-Jeopardy grounds] is limited to intentional misconduct by a prosecutor or whether it extends to gross negligence on the part of the prosecutor or judge. (Petition, at 14-15).

We note at the outset that, notwithstanding petitioner's reference to the trial judge in this formulation of the issue presented, the petition herein does not appear to raise any claim of misconduct on the part of the judge, and no such contention was made below. Presumably, the reference to the judge was included in an attempt to echo the language of *Dinitz* and the other cases cited by petitioner.

More importantly, if this were a case in which the Oregon Court of Appeals had held that the conduct of the prosecutor, while grossly negligent, did not reach the level of "bad faith conduct" condemned in *Dinitz,* we might agree that — with the exception noted above — the question formulated by petitioner is appropriately presented herein. But this is not such a case. It is simply a case in which the court of appeals concluded, from the record herein, that there was "*no basis* for characterizing the prosecutor's conduct as intentional misconduct, bad faith or overreaching" (Petition, at A-10; 33 Or. App. at 143; 575 P.2d at 1003) (emphasis added); and as our supplemental statement of the case herein demonstrates, the record supports that conclusion. This Court should not disturb it.

Petitioner is really asking this Court to retry the factual question of the prosecutor's supposed culpability in this case, as is evidenced by petitioner's argument that, contrary to the court of appeals' determination, the prosecutor's actions "were, at a minimum, gross negligence," or even "part of a plan to try petitioner by innuendo" (Petition, at 14). Review for this purpose is not warranted.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 1979